COST RECOVERY PROCEDURES

FOR STATE UST PROGRAMS

TO RECOVER LUST TRUST FUND EXPENDITURES

PREPARED BY

THE EPA REGION IV UST ATTORNEYS WORKGROUP

January 1995

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Note on Purposes and Use of This Memorandum

The procedures set forth herein are intended solely for the guidance of UST Program managers, attorneys and other UST program employees of the States within EPA Region IV. They do not constitute rule-making by EPA or the States and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person including any owner or operator of a UST system or facility. States may take any action at variance with these procedures contained in this memorandum, or which are not in compliance with internal office procedures that may be adopted pursuant to these materials.

We believe that this memorandum generally covers the subject of procedures to be involved in cost recovery actions under RCRA Subtitle I, but if you have any questions or problems involving this subject matter, please call:

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I. Introduction

Section 9003(h)(6) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (hereinafter collectively referred to as RCRA), 42 U.S.C. § 6991b(h)(6) provides generally that whenever costs have been incurred by EPA or a State that has entered into a cooperative agreement with EPA for undertaking corrective action or enforcement with respect to a release or suspected release of petroleum from an UST, the UST owner or operator shall be liable to EPA or the State for such costs.

Although it is highly desirable to obtain response actions in the first instance by the UST owner or operator, rather than by the EPA or the State, there are and will continue to be cases in which the state agency may respond to releases using LUST Trust Funds monies for site response actions, and thereafter attempt to recover those costs from the owner and/or operator who is liable under Section 9003 of RCRA and other authorities. The recovery of LUST Trust Fund expenditures through the cost recovery program should be a part of the state UST program. The costs associated with such LUST Trust Fund financed response actions are recoverable from the party or parties who are liable under Section 9003(h) of RCRA.[1]

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[1] Section 9003(h)(6) provides that whenever costs have been incurred by EPA or a State that has entered into a cooperative agreement with EPA for undertaking corrective action or enforcement

Due to the possibility of cost recovery efforts in any case in which LUST Trust funds are expended, the observation, documentation and preservation of critical facts and response costs is important to assure that:

1) potential evidence concerning the facility and the owner and/or operator is noted and documented before response activity or the passage of time obscures or eliminates it;
2) physical evidence essential at trial is collected and preserved appropriately; and
3) sufficient evidence of total costs and claims paid from the Fund has been maintained and is available to support recovery.

This memorandum describes elements which a State UST Program may probably be called upon to prove in a cost recovery action; the assembly and maintenance of a cost recovery file; some examples of appropriate documentation for each element of the case; procedures for processing and negotiating cost recovery claims; and the mechanics of repayment of any recovery to the Fund. The Workgroup encourages each State UST Program to observe these procedures when working on a site on which LUST Trust Fund monies are expended for cleanup of a UST or a facility since each of these cleanup is the subject of a potential cost recovery

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with respect to a release of petroleum from an UST, the UST owner or operator shall be liable to EPA or the State for such costs.

action. These procedures should be used in conjunction with existing EPA Office of Solid Waste and Emergency Response guidance policy.

II. The Cost Recovery Program

Generally, the objectives of a cost recovery program are: 1) maximize return of revenue to the LUST Trust Fund; 2) initiate necessary litigation or resolve ready cases for cost recovery within strategic time frames but no later than the time provided under the statute of limitations; 3) encourage settlement by implementing an effective cost recovery program against nonsettlers (i.e., recalcitrant) and, 4) use administrative authorities effectively to resolve cases without unnecessary recourse to litigation.

In managing the program and achieving these objectives, the State is encouraged to ensure that each response action (and supporting case development activities) undertaken using LUST Trust Fund monies proceeds in a manner that will optimize its cost recovery potential. The Workgroup believes that evaluating each case consistent with this guidance will assist the State in acheiving its cost recovery objectives.

The stage at which a case becomes ready for cost recovery is an important concept. A conventional cost recovery case is ready when cleanup activities are completed, although some cases may be

ready concurrent with the initiation of on-site construction of the corrective action or the remedial design.

Since resources available to a State's UST program are limited, the State should establish priorities consistent with OUST policy guidance[2] and select and plan actions in a manner and at a time which will provide for the maximum return of LUST Trust Fund monies to the State. A State should devote its greatest efforts to cases where the owner or operator is solvent but recalcitrant or where they fail to comply with financial responsibility requirements. However, statute of limitations and other considerations may warrant the immediate pursuit of a case.

To conserve resources, an attempt should be made to settle cost recovery cases whenever possible. Settlement should result in cost recovery case resolution for some cases in a shorter time frame and with fewer resources than traditional litigation. In many cases, it may be necessary to pursue traditional litigation.

In considering whether to litigate a case, a State should consider the solvency of the owner/operator (O/O), the cost of the cleanup, the likelihood of recovery, and the case's deterrence value.

Finally, the realization of the cost recovery's objectives depends on the effective management of all aspects of the cost

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[2] OSWER Directive 9650.10 entitled LUST Trust Fund Cooperative Agreement Guidelines; EPA memorandum dated August 23, 1991 entitled Revisions to LUST Trust Fund Policy and Guidelines; and OSWER Directive 9610.10 entitled Cost Recovery Policy For The Leaking Underground Storage Tank Trust Fund.

recovery program. Each State is encouraged to implement a well-defined process to ensure coordination among its program/enforcement offices, its financial management office, and its legal offices. The process should also foster the efficient management of the elements of the cost recovery program including systems to cover the following:

1) the on-going review, selection, and referral of ripe cases;
2) the assembly of complete cost documentation;
3) tracking and collection of fund expenditures including cleanup, oversight and enforcement costs;
4) the review and documentation to close-out cases for which cost recovery will not be pursued;
5) the effective use of settlement or litigation procedures;
6) the tracking and follow-through of active cases in litigation; and,
7) the establishment and collection of accounts receivable.

The Workgroup encourages a State to utilize its cost recovery enforcement authorities. Cost recovery creates an incentive for settlement and disincentive for refusal to settle. An atmosphere of risk of cost recovery litigation promotes settlement for corrective actions as well as settlements for cost recovery.

III. Case Selection

The following case selection guidelines, when applied to case candidates, will help States make decisions regarding which actions to pursue. Moreover, these guidelines will help to ensure that resources are mainly directed towards those cases which have the highest potential for replenishing the Fund. This recognizes that a full cost recovery action, including litigation, may not be pursued for every case due to certain factors such as O/O viability and evidentiary reasons as well as where the cost of collection is disproportionately high.

Generally, a cost recovery action should be scheduled for every facility or site where a LUST Trust Fund monies have been expended. For that reason, case preparation activities should begin early in the process.

EPA guidance[3] suggests that greatest efforts be devoted to cases where the O/O is solvent but recalcitrant and in cases where they fail to comply with the financial responsibility requirements. If an owner or operator or any other responsible person cannot be identified it is impracticable to pursue cost recovery at all. Less efforts should be devoted to cases involving an insolvent or financially distressed owner or

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[3] Cost Recovery Policy For The Leaking Underground Storage Tank Trusy Fund, Oswer Directive 9610.10.

operator. But selective pursuit of low priority cases is suggested when:

1) the O/O can afford lesser amount;

2) the O/O is hiding assets;

3) the O/O fails to cooperate; or

4) the O/O was negligent in allowing the release to occur.

In determining the level of effort to apply to a particular case, the relevant factors to be considered include:

1) the total amount of costs;

2) the likelihood of the recovery based upon the strength of evidence connecting the potential defendant to the release and to the ownership/operation of the UST;

3) the extent of the release and cleanup (expenditures) documentation;

4) the solvency of the O/O (i.e., the financial ability of the potential defendants to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement);

5) The deterrent value of the case vs. other cases competing for resources; and

6) the opportunity costs.

Other reasons for selecting a case for litigation includes cases where evidence linking the owner or operator to the facility is good, the case may be used to create good precedent (such as a site where the State issued a unilateral order, the

O/O did not comply, and the State is likely to obtain a favorable ruling for costs including interest, treble damages and/or penalties), or the case is otherwise meritorious.

Another category of cases are those where there has been a partial settlement providing the State less than full relief and there is another viable non-settler. For example, where the State has settled with the UST operator but the UST owner refuses to settle. These actions should be pursued promptly as a disincentive to a non-settler.

These guidelines do not relate directly to bankruptcy actions because they often present particularly difficult case selection and management issues. A State is frequently operating under time constraints with imperfect information. Nonetheless, it is important in bankruptcy cases to make reasoned and informed judgments on whether a bankruptcy action is worth pursuing, given other demands on State resources. This requires, at a minimum, an evaluation of the following factors:

1) the amount of funds to be recovered;
2) the evidence against the O/O;
3) the likelihood of a full or significant recovery given the assets and liabilities of the O/O;
4) the claims of secured and unsecured creditors; and
5) the likely State resources involved.

When the likelihood of significant recovery compared to resource utilization in pursuit of the recovery is high, bankruptcy actions should be pursued.

IV. Elements of A Cost Recovery Action

To successfully pursue a cost recovery action, a State should be prepared to introduce evidence demonstrating:

1) there is a release of petroleum into the environment;
2) the release is from a facility;
3) the release caused the State to incur response costs;
4) the Defendant is an owner or operator under the State's UST statute.

The financial condition of a responsible party is not an element of proof of the case. Even so, the financial condition of the O/O may be considered[4] in determining the feasibility of a cost recovery action.

The chief elements of a cost recovery action and the nature of evidence required to sustain them are discussed below.

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[4] While we do not believe that it is necessary to introduce evidence that clean up would not have been done properly by the owner or operator of a facility or by any other responsible party, it would be prudent to have available evidence of efforts by the State's UST Program to obtain a response action at the facility. The notice letters forwarded by the State to owner or operator and their responses are examples of such evidence.

V. Cost Recovery Procedures

Specific cost recovery procedures may vary among the various Region IV States. The workgroup encourages each State to follw these guidelines as closely as possible for consistency. Generally, the fundamental procedures for a cost recovery action are:

(1) determination of a release;

(2) notification of liability to the owner and operator;

(3) negotiation/settlement of case;

(4) response action (if owner or operator is unable or unwilling to conduct cleanup);

(5) demand for payment;

(6) negotiation/settlement of cost recovery claim;

(7) cost recovery litigation (if settlement efforts fail); and

(8) collection of cost and case closure.

Although each State has considerable discretion in prioritizing cases for cost recovery and in determining an appropriate level of effort to devote to each case, each State, at a minimum, should make the following cost recovery efforts for cases in which LUST Trust Fund monies were expended.[5] These minimum efforts are:

1) to identify any viable O/Os;

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[5] Cost Recovery Policy For The Leaking Underground Storage Tank Trust Fund, Oswer Directive 9610.10.

2) to notify O/Os of their liability for enforcement and corrective action costs; and

3) to demand payment of costs.

A. Timing of the Cost Recovery Action

Cost recovery actions for expenses incurred in clean-ups do not have to be initiated until after such response activity has been completed. However, a cost recovery action need not be delayed where there is a multi-phase response action being implemented (e.g., soil cleanup and groundwater cleanup). A cost recovery action can begin before completion of the last phase of response activity or costs expended to date and also for calculable future costs.

Where one stage of cleanup follows another in fairly rapid succession, cost recovery actions should be initiated, after the cleanup is fully completed. In situations where there are substantial delays between phases, however, the State may decide to commence a recovery action at an intermediate stage. In these instances, negotiations regarding recovery of expenditures may be combined with discussions with the owner or operator over prospective cleanup activities. At a minimum, all cost recovery actions should be initiated before the State's statute of limitations expires.

B. The Owner/Operator (O/O) Search

The identification of the O/O is central to all cost recovery actions. The search should uncover a party with whom

the State may negotiate and from whom the State may seek recovery of costs in the future, as well as develop the evidence of liability that may be used in litigation. The O/O search should be initiated following the initial discovery of a release. The search may continue throughout the cleanup and cost recovery process.

At the time of discovery of a release, a preliminary O/O search should be conducted by the State to identify the O/O of the UST facility. The completed search should include the following tasks:

1) history of operations at the UST facility;
2) verification of the ownership of the facility property;
3) State agency record collection and file review;
4) O/O status and history;
5) records compilation;
6) issuance of information requests;
7) financial status determination;
8) O/O legal name and address updates; and
9) the preparation of an O/O search report.

Any or all of these items should be obtained prior to the initiation of the cleanup action where time permits. However, since some cleanups are of an emergency nature, and there is often little time prior to initiation of such emergency actions, there may not be time to obtain all search items prior to the

cleanup. Each search should be initiated at the earliest possible time prior to the completion of the cleanup.

Program, enforcement and legal staff should work closely together in the development of the O/O search from the initial planning stages through the production of the search report.

During the cleanup action, the search for the owner or operator (i.e., responsible parties) should continue. Any newly identified owner or operator, if any, should be issued notice letters and administrative orders as appropriate.

At a minimum, after the completion of the cleanup, the O/O search should be evaluated for completeness. The State's legal counsel assigned to the case should review the search for evidentiary sufficiency. The decision to conduct any additional search activities not yet initiated should be made on the basis of the sufficiency of the evidence and consistent with the total costs of response and the likelihood of identifying any additional O/O. The higher the costs of response, the stronger the effort should be to locate and link an O/O to the facility.

If the search has not identified any viable owner or operator, the case should be closed out by way of a cost recovery close-out memorandum. This will provide documentation that the cost recovery potential has been evaluated and remove the case from further consideration.

C. Notice Letter of Liability For Cleanup/Costs

One of the first steps in establishing cost recovery liability is to document that all parties (all O/Os identified by the O/O Search) were notified of their potential liability for the response action and/or the cost of the response action if conducted by the State including oversight and enforcement costs. The notice should also give the owner and/or operator the opportunity to conduct the response action and, if so, to contact the program staff. In addition, the notice should inform the adressee(s) that, if they do not conduct the response action, the State may conduct the response action and may seek to recover the costs of the action from them at a later date. The notice should be issued to the identified owners and/operators upon the completion of the O/O Search. The notice letter should contain:

1) confirmation of potential liability as O/O for:
   a) response action; or
   b) costs of investigation, planning, response, oversight and enforcement including interest; and
   c) civil penalties
2) reference to the State's UST statute and RCRA Subtitle I to establish liability;
3) a statement that a release has been documented;
4) information indicating that addressee is O/O of UST facility;
5) notification of forthcoming response action that O/O may be asked to perform or finance;

6) a description of planned response actions if available;

7) a statement encouraging O/O to contact Program; and

8) a statement that the letter is for notification and information purposes and is not a final agency decision.

The primary responsibility for preparation and issuance of the notice letter should be in the State's program office.[6]

D. **The Demand Letter**

The first formal step in the commencement of a cost recovery proceeding will be the issuance of a letter of demand from the State to the owner and/or operator as potentially responsible party or parties for payment of costs expended on the site. A demand letter should be sent to all parties in a case who have been identified as an owner and operator and should be issued after all response activity has been completed, or at the completion of one phase of a multi-phase response where the entire process will require an extended period of time.

Before a demand letter is sent, the potential case should be analyzed for the elements in part III above, including identification of the owner and/or operator and assembly of cost information. At the time the demand letter is sent, the State should be able to answer reasonable questions posed by a

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[6] Program and legal personnel should consult with their supervisors to determine who has delegated authority or responsibility for preparing and issuing demand letters in their State.

recipient of the letter. Program personnel should have referred the case to the program attorney (or recommended against an action) and program staff should have resolved their position on a referral so that the State is prepared to file a complaint if the response to the demand letter is unsatisfactory.

The letter should be issued where response costs have been incurred regardless of whether a decision has been made to initiate a judicial proceeding for cost recovery.

The demand letter should contain the following points:

1) reference to State's authority to recover costs for the response activities;
2) the location of the site;
3) the presence of petroleum released from the UST;
4) in general terms, the dates and types of response activity undertaken by the State at the facility;
5) any notice(s) given to the recipient prior to or during the response activity allowing the recipient the opportunity to undertake the work or pay the expense of the response action;
6) the total cost of the response activity[7] broken down into general categories;

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[7] It is suggested that the amount stated in the demand letter be the total obligated by the State to be expended on the site, rather than the amount shown by State records to have been expended on the site at the time the letter is prepared. This is to avoid problems caused by delays in payment of response costs after a demand letter has been forwarded to the owner/operator. Even so, available records should be assembled as soon as possible. Where it is expected that future costs will be paid (e.g., in the next phase of

7) a general statement that the State has determined that the recipient is a responsible party and liable for the sum, set forth;

8) the demand for payment;

9) a statement that the recipient of the letter should contact the Sate within a specified period (normally thirty days) to discuss the account and the recipient's liability therefore;

10) a warning that if the recipient fails to contact the State within the specified time, a suit may be filed in the appropriate court for recovery of the costs;

11) a warning that the "amounts recoverable in an action shall include interest on all costs incurred by the State as a result of the cleanup activity. Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned."; and

12) the name, address and telephone number of a representative of the State who the recipient should

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response activity), the letter should also clearly state that in addition to the sums already obligated and spent, the State expects to expend additional sums on the site for which claim will be made against the owner/operator. Of course, in a proceeding in the cost recovery action, the State will be required to prove the actual amounts spent from the LUST Trust Fund.

contact. [A sample demand letter is attached to this memorandum, as Appendix A.]

Like the notice letter, the primary responsibility for preparation and issuance of the demand letter should be in the State's program office.[8]

E. Procedure In Event of Response From Demand Letter

In many cases, the recipients of demand letters will contact the program office and express interest in discussing their status as a responsible O/O. The State should encourage such negotiations. These negotiations often lead to the settlement of the case.

The State has several ways to settle a cost recovery action:

1) a consent decree;

2) an administrative order; or

3) a memorandum of agreement or inter-agency agreement (if the responsible O/O is another governmental agency).

In some cases where the party is unable to pay in a lump sum, or where there is the legitimate reason for delayed payment, the State may want to allow settlements in which the responsible O/O agrees to pay the claim in periodic payments. Before considering installment payments however, it is suggested that

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[8] Program and legal personnel should consult with their supervisors to determine who has delegated authority or responsibility for preparing and issuing demand letters in their State.

the State review the financial condition of the responsible O/O to determine if installment payments are warranted.

F. Settlements Agreements

If negotiations are successful, agreements should be formalized in an administrative document[9], a judicial consent decree. If the settlement involves another public agency, the agreement should be formalized in an Inter-Agency Agreement or a Memorandum of Agreement. The State may enter a partial settlement with an O/O and seek to recover unreimbursed costs from other nonsettlers. Where the State does enter into a partial settlement, any viable recalcitrant O/O should be pursued as soon as practicable for the remainder of the costs.

The settlement agreement should contain a provision which describes the manner of determining the amount, the documentation to be furnished by the State, the schedule for billing by the State, and payment by the owner or operator of the oversight costs incurred by the State.

Where a settlement agreement contains a provision for the reimbursement of oversight costs, the program office should establish an account receivable and track receipt of the oversight costs.

A settlement for the O/O to conduct the cleanup may include the requirement that the O/O pay for cost incurred by the State

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[9] The State should determine if the program has the authority to settle cost claims administratively.

in obtaining assistance from third parties in the oversight including extramural costs (contracts and interagency agreements) and intramural costs (payroll, travel and other costs) on a specified schedule.

G. **Procedure in Event of No Response to Demand Letter**

If no response is received to the demand letter, the State should determine whether the facts of the case justify the State taking further steps to pursue the cost recovery claim. A decision whether the case should be referred to the program attorney should be made by the program at the time. Relevant factors to consider include:

1) the strength of the facts connecting the potential defendant(s) to the release and as the O/O of the UST;
2) the extent of the release, remedy and expenditure documentation by the State; and
3) the financial ability of the potential defendants to satisfy a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement;

In considering the ability of the potentially responsible O/O to pay, the State should assess the financial condition of each potentially responsible party.

The determination of the program to initiate a cost recovery action should be forwarded in the same manner as the referral of other matters for litigation (typically by a memorandum from the program director to the legal office director). A decision not

to initiate a cost recovery action must be reflected in a close-out memorandum as is discussed in more detail in this memorandum. An affirmative decision should be made by the State in each case in which LUST Trust Funds are expended, whether that decision be to proceed or not to proceed. This is necessary because of the State's accountability for management of the LUST Trust Fund monies.

VI. Cost Documentation

The development of the cost documentation is central to the Agency's ability to recover costs. If after completion of a cleanup, a decision is made to file a cost recovery action, the cost documentation will serve as the basis for the action. Pursuant to EPA Policy, States must maintain cost recovery accounting and recordkeeping systems that:

1) documents expenditures;
2) supports cost recovery actions with specific records;
3) demonstrates that recovered monies are retained and used for additional eligible activities; and
4) conforms to these guidelines and the LUST Trust Fund Financial Management Handbook.

Documentation for cases should include the total costs of the response activity. These costs may include:

1) State administrative expenditures including personnel (management and support) payroll costs;
2) contract costs;

3) money paid to other state or federal agencies through interagency or cooperative agreements;

4) oversight costs[10] including personnel payroll costs;

5) enforcement costs; and

6) interest on costs.

The Workgroup encourages State personnel to document all time and travel associated with a cleanup action. It is suggested that a site-specific account number be used to document all of the above costs. Moreover, it is suggested that the site-specific information regarding cleanup activities be documented. This site-specific information may include:

1) the facility location and description;

2) the results of investigation (including identification of O/Os);

3) all enforcement actions taken;

4) responses taken and time frames; and

5) all costs with contractor invoices.

Pursuant to EPA policy guidance, site-specific accounting is not required for every site.

Enforcement costs should be documented. Enforcement costs may include:

1) all expenditures reasonably related to inducing a recalcitrant responsible party to comply;

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[10] A State may choose not to pursue oversight cost alone as an incentive to O/Os to conduct the cleanup.

2) all expenditures reasonably related to recovering cleanup expenditures.

3) Salaries and other expense associated with case development, negotiations, and litigation.

States should establish a cost-effective accounting system to support recovery of Fund monies in court. Essential features of such a system are:

1) is adequate for both cost recovery and audit purposes;

2) at a minimum, it should provide proof that:

a. the work was authorized by the State;

b. the work was completed;

c. the State was billed; and

d. the bill was paid.

3. assist the State in responding to arguments that the cost are unreasonable and/or unnecessary.

Additional documentation may be required later to respond to an O/O in negotiation or to prepare for litigation. The Workgroup recommends that the documentation of activities and accounting of costs should occur whether the cleanup is being conducted by the State or the O/O under State oversight.

During a LUST Trust Fund-financed cleanup, each State contractor or other organization should be responsible for keeping a seperate accounting of its activities and the costs corresponding to those activities/items. Agreements with other

State or Federal agencies should include requirements that they maintain documentation according to standard State procedures for cost recovery. Cost documentation should be maintained at least as long as the state's statute of limitations period.

When the cleanup is being conducted by the owner or operator, the State may document all costs of all Fund-financed activities associated with the oversight of that action.

Once a case for the recovery of remedial action costs has been referred to the State's Legal Division, the Program must periodically document on-going costs incurred and submit these costs to attorneys. The litigation team should discuss the frequency and timing of the periodic cost up-dates.

VII. Evidence of Costs of Response Action

Collecting evidence of costs of a response action taken at a facility is likely to be a time consuming task. Documents must be obtained from a variety of participants in the cleanup activity including agency contractors and others. The success of any cost recovery action depends upon the use of good bookkeeping and record collection techniques.

A variety of mechanisms are available for tracking costs. Whatever method of accounting is used, it should ensure accurate record keeping and preservation of all costs attributable to a particular UST or facility. To further this objective, contracts

between a State and the contractor for performance of a response action should specifically require that accounting procedures used by the contractor be approved by the State.

Each State is encouraged to establish an accounting and expense-tracking system and should be followed closely by all State agency personnel and contractors working on LUST Trust-funded facilities. This system generally involves the assignment of a unique accounting number to each specific site, and the charging of time, material and other expenditures to that account number.

Evidence of the cleanup costs should be preserved and available for introduction into evidence. This could include such documentation as receipts for money paid for goods or services; canceled checks; contracts and any amendments thereof; purchase orders; invoices; records of time spent, where the claim includes the value of such time; travel records and vouchers; and records of all correspondence or other communication regarding the actual costs, as well as progress reports on the work performed. The names, addresses and telephone numbers of all persons maintaining the regular business records of contractors or other persons outside the State agency should also be maintained for ready reference.

VIII. Assembling A Cost Recovery Action

The assembly of evidence for a cost recovery action begins with the first response action taken under the State's corrective action authority. The potential for a cost recovery action should be presumed; accordingly the collection of relevant documentation is important. Generally, a State should pursue a cost recovery action when there is a solvent owner or operator. Where other government action(s) against the owner or operator is contemplated or pending, such as an action to compel compliance with applicable UST requirements, i.e., to provide release detection, a cost recovery count for costs may be added to the ongoing litigation.

The State's UST Program has the responsibility of collecting and maintaining the documents used as evidence in cost recovery actions. In matters requiring legal opinions (such as the legal right of the State to enter a facility) or the preparation of legal documents, the program manager should consult with and obtain the assistance of the State's program attorney or the appropriate State Attorney General.

IX. Maintenance and Coordination of Evidence in Event of Referral

There will inevitably be logistical difficulties in maintaining and coordinating the production of the mass of data, contracts, cost records, and other evidence generated in a response activity. It is very important to provide for an orderly method of expeditiously providing that information during

the course of a cost recovery action for use during case development, discovery, and trial.

Records documenting LUST Trust Fund expenditures should be maintained for a period of not the State's applicable statute of limitations.

The Workgroup encourages the State to maintain and periodically update the cost expenditure tracking system for each facility referred to above, so that an itemization of all costs attributable to a particular facility can be quickly obtained. When a determination is made that a case should be referred to the program attorney for filing (or, if necessary, during the time that the demand letter is being prepared or the case is being considered for referral), a request can be made of the persons, firms or agencies involved in a response activity for copies of its records. At that tire, a complete file of all records involved in the particular case can be compiled and delivered to the program attorney with copies of the complete file made available to appropriate State personnel.

X. Statute of Limitations

The Workgroup encourages that each Program attorney research and determine if its statute of limitations is like or unlike federal SOL law.

XI. Documenting Decisions Not To Take Cost Recovery Actions

If upon review of the case, the State decides not to pursue a cost recovery action, the decision should be documented in a cost recovery close-out memorandum. A close-out memorandum (See Appendix B) provides documentation for why the State has not pursued cost recovery in a particular case. Moreover, this memorandum will provide information necessary for predicting revenues for fund-lead cleanups in future years.

A. Timing of the Memorandum

When to prepare a cost recovery close-out memorandum will depend upon the specifics of the case. Normally, the decision not to pursue cost recovery should be made some time after the case would be ready for referral of an action to the program attorney for cost recovery. Cleanup actions are ready for referral immediately following completion of the cleanup. The close-out memorandum may be prepared as soon as the State is reasonably sure that information developed later has no bearing on viability of a cost recovery action. For example, if a thorough O/O search is conducted prior to the commencement of a LUST Trust Funded cleanup but no viable O/Os are found, a cost recovery close-out memorandum may be prepared while the cleanup is underway. If there is a settlement for less than all costs and the State does not intend to recover the remaining costs (e.g., where there are no viable O/Os), this should be addressed in the close-out memorandum.

B. Content of the Memorandum Documenting a Decision Not To Pursue Cost Recovery

If all available enforcement information on a site points to a recommendation not to pursue cost recovery, a close-out memorandum should be written by the program staff with program manager approval and, where legal issues are involved, in consultation with the program attorney. The Memorandum and its supporting documents if any should be placed in the permanent site file.

The memorandum should include four sections:

1) Site Description;

2) Work Conducted and Associated Costs;

3) Discussion of Basis not to Pursue Cost Recovery; and

4) Conclusion.

B1. Site Description

This section should briefly identify the site and its location, and an identification number, if any. It should very briefly describe the environmental condition of the site.

B2. Work Authorized and Conducted and Associated Costs

This section should briefly describe the action(s) taken by the State or a contractor at the Facility and the initiation and completion date of the response action(s) taken. In addition, this section should provide an estimate of the amount of money spent or expected to be spent for all past and future response actions. This section should also note any previous settlements (whether for work or cost recovery) and the dollar value of the settlements.

B3. Discussion of Basis not to Pursue Cost Recovery

This section should include the information that leads the Program Director to the conclusion that further cost recovery efforts should not occur. The memorandum must clearly state the reason that the decision was made not to pursue cost recovery at the facility. Possible reasons include:

1) No O/O was identified for the facility. The O/O search report or other documentation of the completed O/O search effort should be referenced.

2) The O/Os identified in the O/O search are not financially viable. A written evaluation of the ability of any identified O/O to pay a judgment for the amount of the claim or to pay a substantial portion of the claim in settlement should be conducted during the O/O search.[11] The close-out memorandum should reference the results of the evaluation.

3) The available evidence does not support one or more essential elements of a prospective case and there is no reason to believe that such evidence can be discovered or developed in the future.

4) The total costs of cleanup at the facility does not exceed projected litigation costs and settlement efforts have been exhausted. While such small cases

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[11] A CERCLA guidance document entitled The Potentially Responsible Search Manual, (OSWER Directive No. 9834.6) provides information on how to go about collecting information on the financial status of companies and individuals.

should not automatically be closed out for this reason, some may have to be.

5) There may be reasons, not identified above, that form the basis for making a decision not to pursue cost recovery (or further cost recovery) at a particular facility. One example is the existence of an agreement by the O/O (in the form of a consent order or decree) to conduct the response action(s) approved by the State. While the Agency may not have waived explicitly in the settlement some or all of oversight costs incurred, the Agency may decide later not to pursue those costs because the O/O has been cooperative in agreeing to conduct work. In this example, if there are nonsettlors, the close-out memorandum should analyze the case against them based upon the factors delineated above. A low dollar threshold should not necessarily apply to a case where there are recalcitrant O/Os or nonsettlors.

Each close-out memorandum prepared should contain at least one of the above reasons but should contain all the reasons that exist.

B4. Conclusion

The conclusion should restate the amount of the total response costs expended or projected for the site not previously

recovered. It should also briefly restate the basis for not pursuing cost recovery at the site.

C. **New Information**

In the event that a Cost Recovery Close-Out Memorandum has been issued and new relevant information comes to light, the case should be re-examined to determine whether the decision not to proceed with cost recovery efforts is still valid. Factors to be reviewed include:

1) the total dollar amount of funds expended or to be expended;
2) any changes to the strength of the case resulting from new information; or
3) the financial condition of the O/O changes.

Appendix A

(Model Demand Letter)

XYZ Corp.
Someplace, State 00000
Re: Name, location of site

Dear Sir or Madam:

On or about _____, 199_, there were releases into the environment of petroleum from the _____ facility located at or about _____. [In addition, there were releases of petroleum that may present an imminent and substantial danger to the public health or welfare.]

On or about _____, 199_, the State of _____, Department of _____ (the Department) gave [oral] notice to you (which was confirmed by letter of _____, 199_, advising you regarding the referenced facility and that you are a party who may be liable as an owner and/or operator for money expended by the government to take corrective action at the facility. We offered you the opportunity to discuss with _____ your voluntarily taking corrective action necessary to abate, contain or cleanup any releases from the facility. You did not undertake the necessary corrective actions.

In accordance with (insert State statutory authority) and Section 9003 of the Solid Waste Disposal Act, commonly referred to as Subtitle I of the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. Section 6991b, the (name of the State agency), pursuant to an agreement with and funding by the United States Environmental Protection Agency (EPA), undertook a response action using Federal LUST Trust Fund monies provided for such actions at the above facility. The action began on or about _____, 199_, and continued to on or about _____, 199_. The State's response action entailed the (describe generally what was done).

The cost of the response action [performed] (caused to be performed by the Department at the facility] (was) [is currently) approximately $ _____. [The Department anticipates expending additional funds in the future under authority of (insert State's statutory authority) and RCRA § 9003, 42 U.S.C. 6991b, for additional response activity which the Department deems appropriate to be performed at the site.] Enclosed is a statement summarizing the expenditures to date.

Information available to the Department indicates among other things that you (choose one or more, of the bracketed clauses as appropriate:) [are/were at the time of the response action the O/O of the facility] [were the O/O of the facility at the time of release of regulated substances at the facility].

Pursuant to the provisions of (insert State's statutory authority) and Section 9003 of RCRA, we have determined that you are liable for the payment of all costs expended at the facility to the LUST Trust Fund established pursuant to Section 9003 of RCRA, 42 U.S.C. 6991b, which is administered by the Department in the State of _____ through an agreement with EPA.

We hereby request that you, as the [owner][operator] make restitution by payment of the herein stated amount plus interest pursuant to (insert State's statutory authority) [together with any sums hereafter expended by the Department at the facility pursuant to authority of RCRA). [The names of other responsible owners/operators receiving this request for payment are enclosed with this letter to facilitate organization among the identified parties concerning payment.) If you desire to discuss your liability with the Department, please contact the person named below in writing not later than thirty (30) days after the date of this letter. We will otherwise assume that you have declined to reimburse the LUST Trust Fund for the facility expenditures and will subsequently pursue civil litigation against you.

Sincerely,

Contact Person:
[Name]
[Title]
[Address)

Appendix B

(Model Close-Out Memorandum)

MEMORANDUM

DATE:

SUBJECT: ABC Manufacturing Plant UST Facility
Case # _____

FROM: [Name of program staff responsible for preparing the memorandum]

TO: [Name of the UST Program Manager]

The purpose of this memorandum is to detail the reasons that form the basis of the Division's determination that the recovery of LUST Trust Fund monies expended at the above referenced UST facility should not be pursued.

1) Site Description

The ABC Manufacturing Company (the company) is commercial textile manufacturing facility located at 345 Main Street in Mountain City, Tennessee. The company is the owner/operator of five (5) underground storage tanks (USTs). All 5 USTs are located at the company's above manufacturing facility. The USTs are used to fuel the company's truck fleet.

The Division of Underground Storage Tanks (the Division) received a complaint on May 13, 1993 concerning the domestic water well at the Elmer Brown residence located adjacent to the company's facility in Mountain City, Tennessee. On May 17, 1993, Division personnel from the Johnson City Field Office investigated the complaint. A water sample was collected from the Brown's water well. Analysis of this sample indicated the presence of petroleum constituents above the Division's drinking water limits. The Johnson City Field Office contacted the company on May 21, 1993 and talked with the company's president, informing him of the results of the analysis of the Brown's well water. During this phone conversation, the Johnson City Field Office requested that the company provide an alternate water supply to the Brown residence and the company declined the request.

The Division required the company to perform a site assessment at their UST facility. Soil and ground water contamination was found on the company property, however, no petroleum constituents were detected in ground water samples collected from two (2) monitoring wells installed between the

contaminated zones on the company's UST site and the Brown's property. Therefore, no direct connection was established during the assessment between the contamination found at the company's UST facility and in the Brown's water well. There have been numerous meeting between the company and the Division attempting to settle this case. All settlement attempts have been unsuccessful and the company will not admit any liability for the contamination discovered in the Brown's water well.

2) Work Conducted and Associated Costs

On May 26, 1993, the Johnson City Field Office requested approval from the Division's Contract Management Section to use LUST Trust Fund monies to provide the alternative water supply for the Brown residence. On May 28, 1993, the Contract Management Section sent a Notice to Proceed to the Division's Emergency Response Contractor, XYZ Environmental Engineering, Inc., requesting the installation of a filtration system to the Brown's water well and the delivery of bottled water for human consumption. The Division provided these services at the Brown residence for approximately six months expending $11,741.22 from the LUST Trust Fund. In November of 1993, the Company had the Mountain City water supply line extended and connected to the Brown property.

3) Discussion of Basis not to Pursue Cost Recovery

The Division has decided not to pursue cost recovery of the $11,741.22 expended from the LUST Trust Fund at the above UST facility. This decision is based on the following reasons:

1. The Division was unable to establish a direct connection during the assessment between the contamination found at the company's UST facility and in the Brown's water well. Therefore the Division believes that the available evidence does not support the elements of a cost recovery case and there is no reason to believe that this evidence can be discovered or developed in the future. All settlement efforts have been exhausted. The only avenue left to pursue cost recovery is through litigation. Considering all the evidence of this case, the Division believes that pursuing cost recovery through litigation is not a wise use of the Division's money or resources.

2. The total projected costs to litigate this case will exceed the $11,741.22 expended from the LUST Trust Fund at the above UST facility. Due to the lack of evidence, litigation of this case may be unsuccessful. The Division believes that pursuing cost recovery

through litigation is not a wise use of the Division's money or resources.

4) Conclusion

The Division terminated activities at the Brown residence in November of 1993 when the residence was connected to city's water and the filtration system was removed from the Brown's water well. The Division has no plans to pursue cost recovery due to the results of the environmental assessment at the company's UST facility. If the Division were to institute an assessment to attempt to prove a direct connection and/or to litigate the case, the costs would at least equal and probably exceed the costs expended to date. Therefore, the Division plans no further action at this site including cost recovery.

Approved:_____ Date:_____
UST Program Manager

Appendix C

(Outline of Cost Recovery Procedures)

(1) Discovery of a release and identification of the owner and/or operator (O/O) of the UST.

A. an inspector may investigate and identify the O/O via the owner search.

(2) Evaluate whether the State will use LUST TRUST fund monies to remediate the site.

A. determine whether the O/O is financially unable to perform the corrective action at the site.

b. determine whether the O/O is finacially able to remediate the site but refuses or fails to do so.

c. determine whether the State is expending LUST TRUST funds to address an emergency situation.

(3) Send a Notification Letter to the O/Os.

a. notify the O/O of his/her liability and responsibility under the Act and regulations.

b. send the Notification Letter to the O/O by certified mail.

(4) Implement the cleanup action at the UST site.

a. the State must establish and maintain records and documents of all costs expended to cleanup the site.

b, the Workgroup recommends a tracking and records system which generates site-specific documentation; the court system his granted recovery to states in cost recovery actions where the State presented documents and records identifying costs with site-specific records and documentation.

(5) Once the cleanup is complete, reevaluate the facts and circumstances to determine whether the State will seek cost recovery.

a. determine whether the O/O's financial condition has changed.

b. determine the total amount of costs the State will seek to recover from the O/O.

(6) If the State has determined that it will not seek cost recovery, prepare a close-out memorandum.

(7) If the State has determined to seek cost recovery, send (via certified mail) a Demand Letter to the O/O.

(8) Contact and discuss with the O/O the payment of the costs and the payment plan for the debt.

(9) If the O/O fails to response or pay the assessed costs, refer the case to the program attorney to pursue an administrative or court action to recover the costs.

(10) Institute the appropriate rost rerovcry action through the program attorney.

(11) Collection of costs, via settlement or litigation, and case closure.